No. 1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *et al., Petitioners,*

v.

DONNELLY GARMENT COMPANY, a Corporation; DONNELLY GARMENT SALES COMPANY, a Corporation; DONNELLY GARMENT WORKERS' UNION, *et al.*, and CENTRAL SURETY AND INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on January 19, 1945 (R. 593) affirming the judgment of the District Court of the United States for the Western District of Missouri.

OPINIONS BELOW

The opinion of Judge Nordbye in the District Court for the Western District of Missouri (R. 542-567) is reported at 55 F. Supp. 572. Another opinion by Judge Nordbye in this proceeding (R. 33-36) is reported at 47 F. Supp. 67. The opinion in the Circuit Court of Appeals (R. 575-593) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 19, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Plaintiffs and interveners obtained an injunction against a labor union and others, and posted, at various times, three bonds. They claimed, originally, that no "labor dispute" was involved, the District Court agreed, and the first two bonds were framed under the Clayton Act. The Norris-LaGuardia Act subsequently was held to apply, and a third bond was filed, although not in the terms required by that Act. The injunctive orders were all finally held to be erroneous. In this proceeding by the defendants in the suit for injunction to recover "loss, expense or damage" under Section 7 of the Norris-LaGuardia Act, the questions presented are:

1. Whether the first two bonds given by the plaintiffs and interveners in a suit in which the Norris-LaGuardia Act has finally been held applicable are to be read as incorporating the provisions of Section 7 of that Act prescribing the scope of the required undertaking.

2. Whether the final bond, given by plaintiffs and interveners after the Norris-LaGuardia Act was finally held applicable, is not in any event to be read as incorporating those provisions of Section 7.

3. Whether defendants are not entitled to recover by reason of Section 7, irrespective of the bonds, all reasonable attorneys' fees and expenses incurred in connection with the defense against the suit for injunction.

STATUTE INVOLVED

Section 7 of the Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. Sec. 101, *et seq.*) provides, in part, as follows:

> "* * * No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> "The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action

under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

STATEMENT

Petitioners, defendants in a suit for injunction, instituted this proceeding under Section 7 of the Norris-LaGuardia Act following a decision by the Circuit Court of Appeals for the Eighth Circuit that all of the injunctive orders had been erroneously granted by the District Court (119 F. (2d) 892). As authorized by Section 7, the proceeding was begun by motion in the suit for injunction for a hearing to assess against respondents (plaintiffs and interveners below and their surety) the losses, expenses and damages caused petitioners by the erroneous issuance and continuance of a temporary restraining order, temporary injunction, and permanent injunction. The course of proceedings which finally resulted in this hearing extended over a period of more than four years. In brief summary, it is as follows (for the sake of clarity, and in order to distinguish between the various respondents, we shall refer to the parties as they were designated in the injunction suit):

The Parties.—The defendants in the injunction suit are the International Ladies' Garment Workers' Union (hereinafter called "the International"), an international union of workers employed in the women's garment manufacturing industry, and certain of its officers; certain of the locals of the International and certain of their officers; and a large number of the members of the International and locals (R. 37-38; Def. Exh. 152, p. 1, R. 78).

The plaintiffs are two corporations organized under the laws of Missouri: the Donnelly Garment Company, a manufacturer of women's dresses, and the Donnelly

Garments Sales Company, its selling subsidiary (R. 38; Def. Exh. 152, p. 13, R. 78). The interveners are members of the Executive Committee of an unincorporated association of employees of these two corporations, and the association itself—a so-called "plant union"—known as the Donnelly Garment Workers' Union (R. 38; Def. Exh. 152, p. 44, R. 78). Central Surety and Insurance Company is surety on all bonds filed by plaintiffs and interveners. (R. 11, 16-20, 26, 38, 186, 203, 217.)

The First Phase of the Litigation: The Temporary Restraining Order of July 5, 1937.—Plaintiffs instituted this suit on July 5, 1937, to enjoin the defendants from certain acts allegedly done or threatened in furtherance of a conspiracy to destroy the plaintiffs' interstate trade and commerce in violation of the anti-trust laws. Jurisdiction was expressly and solely predicated upon the Sherman and Clayton Acts. (R. 11, 13, 21, 26, 29, 38, 42; Original Bill, R. 181.) Upon presentation of the bill of complaint by the plaintiffs at an *ex parte* hearing, Judge Otis granted a temporary restraining order and fixed the amount of the bond at $2,000 (R. 181). On the same day the plaintiffs filed a bond for $2,000 (R. 16, 186), which provides that if the plaintiffs shall pay

> "all such costs and damages as may be incurred or suffered by reason of the wrongful issuance of said restraining order or injunction should it be thereafter dissolved or it be decided that said temporary restraining order was wrongfully obtained, then this obligation to be void, otherwise to remain in full force and virtue." (R. 187.)

Shortly after issuance of the order, defendants launched the first of several attacks upon it. Various

motions contesting jurisdiction and seeking vacation of the order and dismissal of the bill were prepared and filed (R. 59-61, 265-66; Def. Exh. 133, p. 1, R. 58). From the outset it was urged that a labor dispute was involved, that the plaintiffs had failed to comply with the Norris-LaGuardia Act, and that the court was without jurisdiction to issue any restraining order or temporary or permanent injunction (R. 59, 188, 191, 265-66). The plaintiffs argued strenuously that the Norris-LaGuardia Act was inapplicable (R. 191).

On July 10, 1937, Judge Otis heard argument upon the motions (R. 59, 265). Pending the preparation and filing of briefs by the defendants, the plaintiffs amended their bill of complaint to add a prayer for damages. Amended motions were thereupon filed on behalf of the defendants (R. 266-67). Briefs and reply briefs were filed (R. 59-61, 265-66; Def. Exhs. 134-137, R. 61). On August 13, 1937, Judge Otis overruled the motion to vacate the temporary restraining order and dismiss the bill but sustained a motion to strike the amendments adding the claim for damages and a motion to quash service on defendant Perlstein as an individual and as agent of the International, its officers and its General Executive Board (R. 191; 20 F. Supp. 767).

Since service had also been made upon the International through defendant Wave Tobin as agent, a motion was made on July 31, 1937, to quash such service (R. 267). After a hearing on September 4, 1937, and after a brief had been filed (Def. Exh. 138, R. 62), the motion was overruled by Judge Otis on September 27, 1937 (R. 63).

The final step in this first stage of the litigation to set aside the temporary restraining order was taken on September 18, 1937. The plaintiffs had in the meantime

further amended their petition because of certain developments before Judge Otis during the hearing held on September 4, and the defendants filed a motion to dismiss, notwithstanding the amendment (R. 63; Def. Exh. 133, p. 2, R. 58).

The Second Phase of the Litigation: The Temporary Injunction of January 7, 1938.—The Donnelly Garment Workers' Union intervened on September 23, 1937 (R. 63, 192). The petition of intervention contained many allegations similar in nature to those contained in the bill and adopted the same prayers for relief against defendants (Def. Exh. 141, p. 43, R. 68). However, it also alleged that if the course of conduct described constituted a labor dispute within the meaning of the Norris-LaGuardia Act and the National Labor Relations Act, those Acts were unconstitutional (R. 192). Concluding that the petition had injected constitutional issues into the case and that the District Court should, under the then very recent Act of August 24, 1937, be apprised of that fact (R. 63-64), the defendants called the matter to the attention of the District Court in a motion filed on October 5, 1937. Plaintiffs not only agreed that the constitutional questions were in the case but cited cases to the court showing that constitutional issues had been raised (R. 64-65, 194-96). On the same day, Judge Otis certified the fact that the constitutionality of acts of Congress affecting the public interest had been drawn in question and requested the senior Circuit Judge to designate two other judges to participate in hearing and determining the applications for interlocutory and permanent injunctios (R. 65, 194). Judge Kimbrough Stone designated Judge Van Valkenburgh, Judge Reeves and Judge Otis (*cf.* R. 486).

The trial of the cause before the three-judge court—with both affidavits and oral testimony—took place early in November, 1937 (Def. Exhs. 141, 142, R. 68). Briefs and reply briefs were filed (R. 66-67, Def. Exhs. 140, 154, R. 67, 270). On December 31, 1937, the three-judge court announced its decision (27 F. Supp. 807) holding that no labor dispute existed within the meaning of the Norris-LaGuardia Act, granting a temporary injunction and denying defendants' motion to dismiss. Judge Otis dissented. The decree was filed January 7, 1938 (R. 197). On the same day, the plaintiffs and interveners filed a bond for $10,000—the amount required by the court—providing that if the principals shall pay

> "all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary injunction, if it be finally held that said temporary injunction was improvidently granted, then this obligation to be void; otherwise to be and remain in full force and effect." (R. 204.)

The defendants appealed to this Court (R. 67-70; Def. Exhs. 144, 145, R. 70). On May 16, 1938, the Court, after having noted probable jurisdiction (R. 69), dismissed the appeal for want of jurisdiction, but vacated the temporary injunction and remanded the cause to the District Court (304 U. S. 243).

The Third Phase of the Litigation: The Temporary Restraining Order as Modified and Continued July 18, 1938.—After the Supreme Court decision, plaintiffs and interveners both moved for and received leave to amend. On May 23, 1938, defendants filed a motion to vacate the temporary restraining order and to dismiss the bill and petition of intervention on the grounds

that the court was without jurisdiction over the subject matter of the suit and that plaintiffs and interveners had failed to comply with the Norris-LaGuardia Act (R. 71, 210, 273; Def. Exh. 152, p. 5, R. 78). Briefs were filed and the motion was argued on June 13, 1937 (R. 71-72, Def. Exhs. 146-147, R. 72-73). On July 8, 1938, Judge Collet, who had taken the case after counsel for plaintiffs had objected to further participation by Judge Otis (R. 71, 273), held that the bill and petition did not contain the requisite allegations under the Norris-LaGuardia Act and for that reason should be dismissed (R. 73, 211, 273; Def. Exh. 152, p. 61, R. 78). On July 18, 1938, Judge Collet entered a decree, in which he dismissed the bill and petition, and, over defendants' protest (R. 212-213), modified the temporary restraining order of July 5, 1937, and continued it as modified pending appeal (R. 73, 213; Def. Exh. 152, p. 67, R. 78). On the same day, the plaintiffs and interveners filed a bond for $25,000—the amount required by the court—providing as follows:

> "The condition of the above obligation is such that, whereas, the temporary restraining order heretofore issued in this cause is continued as modified on this 18th day of July, 1938, pending appeal of this cause, now, therefore, if the obligors and each of them shall well and truly pay all costs, damages and expenses, including attorneys' fees, suffered by defendants or any of them, by reason of the improvident or erroneous issuance or continuance of said restraining order, then this bond shall be void, otherwise to remain in full force and effect." (R. 218.)

Plaintiffs and interveners were allowed an appeal to the Circuit Court of Appeals on August 4, 1938 (R. 274; Def. Exh. 152, p. 6, R. 78), and that court, on October

28, 1938, reversed Judge Collet's decision dismissing the bill and petition on the ground that, although the Norris-LaGuardia Act applied, the bill sufficiently alleged compliance therewith (99 F. (2d) 309; Def. Exh. 152, p. 68-13, R. 78). The decision continuing the temporary order, modified to meet the requirements of the Norris-LaGuardia Act, was affirmed (99 F. (2d) at 317). The defendants filed a petition for rehearing which was denied (R. 76). The defendants then filed a petition for certiorari (R. 76; Def. Exh. 148A, R. 99-100). That petition was denied on January 16, 1939 (308 U. S. 662), and on January 28, 1939, the mandate of the Circuit Court of Appeals remanding the cause for further proceedings, was filed in the District Court (R. 220).

On February 7, 1939, the defendants filed a motion to vacate the temporary restraining order (R. 76, 229, 275). Judge Collet took it under advisement, and on March 3, 1939, he issued an order, in which he made no ruling but stated his belief that the restraining order had theretofore ceased to exist (R. 230; Def. Exh. 152, p. 82, R. 78).

The Fourth Phase of the Litigation: The Permanent Injunction of April 27, 1939.—On March 4, 1939, defendants' counsel began preparing for the trial of the cause on the merits. Answers were filed to the plaintiffs' amended complaint and the interveners' amended petition; depositions taken, and a trial brief drafted (R. 76-77, 92-93; Def. Exh. 149, R. 77). The trial opened on March 21, 1939, and lasted until April 26, 1939. On April 27, 1939, the District Court granted a permanent injunction against the defendants (R. 78; Def. Exh. 152, p. 129, R. 78).

The defendants appealed. Briefs were filed (Def. Exhs. 150-151, R. 79-80), and the case was argued in March, 1940 (R. 342). On January 27, 1941, the Circuit Court of Appeals on its own motion vacated the prior submission and ordered a reargument limited to the "effect or bearing of the pertinent opinions of the Supreme Court handed down since the submission of this case" (R. 306). Further briefs were filed and the case was reargued (Def. Exhs. 161, 162, R. 363-64; 303).

On June 5, 1941, the Circuit Court of Appeals reversed the decree of the District Court granting the permanent injunction (R. 41, 246, 303), stating (119 F. (2) at 893):

> "Jurisdiction is predicated solely upon the Sherman Act, and if that Act is inapplicable, as the defendants assert, the court below was without jurisdiction."

It then held that the Sherman Act did not apply, and remanded the cause with directions to dismiss the complaint for want of jurisdiction (119 F. (2d) 892). The plaintiffs and interveners filed a petition for rehearing, and a motion to amend the mandate, and the defendants filed a memorandum in opposition (R. 304, 364-65; Def. Exh. 163, R. 365). On July 11, 1941, the court denied the petition for rehearing and the motion to amend the mandate as requested by plaintiffs and interveners, but it did modify its prior mandate to the extent of eliminating the direction to dismiss for lack of jurisdiction, and substituted therefor a remand "for further proceedings not inconsistent with the opinion of this Court" (121 F. (2d) 561, R. 246). The mandate, recorded in the District Court on August 29, 1941, ordered "the Decree of the District Court of the United

States for the Western District of Missouri * * * reversed for want of jurisdiction * * *" (R. 248).[1]

The Expenses of the Litigation.—The International, to which successful defense against the injunctions was vital, took over the entire defense of the suit, and its entire expense. The ultimately successful opposition to the various injunctive orders sought by plaintiffs and interveners cost the International $102,913.57, made up as follows:

1. Legal Fees	$74,925.00
2. Attorneys' Disbursements	8,918.32
3. Reporting and Stenographic Services	8,674.83
4. Photographs and Photostats	946.98
5. Printing	4,663.90
6. Temporary Office	359.49

Evidence as to the reasonableness and necessity of these amounts was adduced in the District Court, and, in addition, following a suggestion of the trial judge (R. 56) evidence was adduced allocating the total among the four phases of the litigation, and in some cases among well-defined portions of the phases themselves (R. 86-93, 256-258, 278, 283-284). In view of the nature of the decisions below, however, it is unnecessary to set forth this evidence.

The court below, and the District Court, held that since the $2000 and $10,000 bonds were given in conformity with the Clayton Act, which did not contemplate attorneys' fees or expenses as "damages", no re-

[1] Upon remand the plaintiffs and interveners dismissed all resident defendants and amended the bill of complaint and petition of intervention to state a cause of action based upon the same allegations of fact but upon a different theory of jurisdiction. After a full trial the bill and petition were dismissed upon the merits. 55 F. Supp. 572.

covery could be had upon them; that the $25,000 bond was given under Equity Rule 74, rather than under Section 7, as contended by defendants, and that it, too, therefore, must be limited to its precise terms: litigation expense and attorneys' fees incurred by reason of the temporary restraining order of July 5, 1937, which were found to be $2000; that the terms of Section 7 of the Norris-LaGuardia Act would not be read into any of the bonds; and that no recovery could be had upon the authority of Section 7, itself. As to the $10,000 bond, the District Court also denied recovery on the ground that the expenses and attorneys' fees resulting from the issuance of the temporary injunction were incurred in an "unnecessary and ill-advised" appeal to the Supreme Court. This was not passed upon by the court below. The District Court gave judgment for the defendants for $2000 on the $25,000 bond, and this judgment was affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing and refusing to hold that the defendants were entitled, under the provisions of the three bonds, construed as incorporating Section 7 of the Norris-LaGuardia Act, to recover the sum of $102,913.57.

2. In failing and refusing to hold that the defendants were entitled, under the provisions of the three bonds, construed as incorporating Section 7, to recover at least the sum of $37,000, the total amount of the bonds.

3. In failing and refusing to hold that the bond for $25,000 was exacted under Section 7 of the Norris-LaGuardia Act, rather than Equity Rule 74, and that defendants were, therefore, entitled to full recovery on this bond.

4. In failing and refusing to hold that Section 7 of the Norris-LaGuardia Act, irrespective of the bonds, authorized the recovery by defendants of the sum of $102,913.57, or, in the alternative, the sum of $37,000.

5. In failing and refusing to hold that recovery upon the bond for $10,000 was not barred because the expenses and attorneys' fees resulting from the issuance of the temporary injunction were incurred in connection with an unnecessary and ill-advised appeal to the Supreme Court.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

Neither the court below nor the District Court denied, of course, that the various injunctive orders were erroneously issued, since the court which issued them was without jurisdiction. Nor did either court deny that the bill and the petition of intervention involved a "labor dispute", and hence that the controversy is within the Norris-LaGuardia Act. Yet, despite those facts, the court below has reached the anomalous conclusion that notwithstanding the issuance of erroneous injunctive orders in a case falling within the scope of the Norris-LaGuardia Act, Section 7 of that Act is ineffective and irrelevant.

The issues, here, are legal, not factual. Recovery was denied, except for the $2000, on legal grounds. Those grounds, however, we believe to be in conflict with decisions both of this court and of other circuit courts of appeal. We also believe that the decision below presents an important question as to the proper interpretation and application of a vital part of the Norris-LaGuardia Act. On both grounds, we believe that review by this

Court is fully warranted, particularly since in both aspects of the case the decision below reverses a uniform trend of decision in the District Courts.

I

THE DECISION OF THE COURT BELOW REFUSING TO CONSTRUE THE BONDS IN THE LIGHT OF THE APPLICABLE STATUTE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL

The court below concedes (R. 587) that there is a well-settled rule requiring statutory bonds and the mandatory statute requiring them to be read *in pari materia*. When the principal on a statutory bond "applies for and receives the contract, privilege or benefit authorized by the statute on the condition expressed in the statute that the principal execute a bond in the terms provided by the statute" then, the court agrees, the principal "is conclusively presumed to have intended to execute the bond in the amount and upon the condition demanded by the statute, the benefit of which he accepts; the language of the statute is written into the bond, though omitted by inadvertence or intention" (R. 587, 588). Many decisions agree. *E.g., Hill* v. *American Surety Co.*, 200 U. S. 197; *Heiser* v. *Woodruff*, 128 F. (2d) 178 (C. C. A. 10th); *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. (2d) 503 (C. C. A. 2d); *Hays* v. *Fidelity & Deposit Co.*, 112 Fed. 872 (C. C. A. 5th).

Here, however, the court below has held (R. 588) that "the rule cannot be applied in the present case" because at the time that the bonds were exacted the District Court had ruled, albeit in error, that the Norris-LaGuardia Act did not apply. The court below cited no cases which

articulate or support any such distinction,[2] nor are we aware of any. On the contrary, the decisions which enunciate the *in pari materia* rule uniformly apply the rule despite any such contention by the principal or the surety. One decision, *McNamara* v. *Calvin*, unreported (N. D. Ill.), which also involved Section 7 of the Norris-LaGuardia Act, is squarely *contra* to the decision below; there the section was read into the bond notwithstanding the fact that the Act had not been passed at the time that the bond was filed.[3] In addition, there are many cases involving actions on bonds required by mandatory statutes in which the argument of the defendant that the bond in suit was not executed or intended as a statutory bond has been summarily rejected. See, *e.g.*, *United States* v. *Hamilton*, 96 F. (2d) 878, 880 (C. C. A. 7th). *Cf. Universal Electric Construction Co.* v. *Robbins*, 194 La. 194 (Ala.); *Camdenton School District* v. *New York Gas Co.*, 340 Mo. 1070, 104 S. W. (2d) 319; *Baumann* v. *City of West Allis*, 187 Wis. 506, 204 N. W. 907. Whether or not the principal on the bond purports to accept the terms of the mandatory statute, the decisions uniformly hold that he is chargeable with notice of all provisions of the applicable statute, and must be conclusively deemed to have acted under it.[4] Indeed, these

[2] The cases cited at R. 589, beginning with *Tenth Ward Road District* v. *Texas & Pacific R. Co.*, 12 F. (2d) 245 (C. C. A. 5th), do not bear even remotely on the issue. They hold merely that in the absence of a mandatory statute, the language of the bond controls, and in the absence of a bond, damages are *damnum absque injuria*.

[3] We have reproduced a statement of the facts and the opinion of Judge Johnson as an Appendix to this petition.

[4] In the *Baumann* case, *supra*, the court stated (204 N. W. at pp. 914-915):

> "Such a statute will be construed in the light of the conditions and circumstances which gave rise to the law, and to

cases are no more than a specific application of the principle that applicable statutes in force when a contract is made, and which affect its validity, performance or enforcement, enter into and form a part of it as if they were expressly referred to and incorporated in its terms. *McCracken* v. *Hayward*, 2 How. 608, 613; *Northern P. R. Co.* v. *Wall*, 241 U. S. 87, 91; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 19 (C. C. A. 8th), aff'd 209 U. S. 56; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663, 666 (C. C. A. 2d), cert. denied 280 U. S. 555; *Cunningham* v. *Weyerhaeuser Timber Co.*, 52 F. Supp. 654, 656 (W. D. Wash.).

Nor is the refusal of the court below to follow the applicable rule supported by reason or logic. Statutes do not, ordinarily at least, apply only if someone purports to obey them. We can perceive no essential difference between a faulty bond given because of a faulty interpretation of a statute, for example, and a faulty bond given because of a faulty decision as to which of two statutes is applicable. Under the decision below, if plaintiffs in a labor dispute can induce two errors instead of one—not only error in the granting of the injunctive order, but also error in the applicability of the Norris-LaGuardia Act—they can successfully escape the liability Congress intended to impose upon them by Section 7.

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effectuate the purpose which the Legislature sought to accomplish. * * * This purpose may not be defeated by the voluntary act or by the oversight of the parties in failing to insert such a provision in the contract. The law imputes such provision to the contract whether written therein or not. The liability is one arising by virtue of the law, independent of the contract. Like the law providing for a standard fire insurance policy, it is both a law and a contract."

We respectfully submit, therefore, that the decision below is not only squarely contrary to the only other decision on this point decided under Section 7, but it is also in direct conflict with the various decisions of this Court and of other Circuit Courts of Appeal which apply the *in pari materia* rule. We also believe it obvious that the intention of Congress to afford full protection to defendants in labor disputes is plainly thwarted.

II

THE DECISION OF THE COURT BELOW REFUSING TO ALLOW DEFENDANTS TO RECOVER UNDER SECTION 7 ITSELF, APART FROM THE BONDS, IS AN ERRONEOUS CONSTRUCTION OF AN IMPORTANT FEDERAL STATUTE

Defendants also urged, both in the District Court and the court below, that they were entitled under Section 7 to recover, apart from the bonds, all reasonable attorneys' fees and expenses incurred in connection with the suit for injunction. This argument, of course, is complementary to that stated in Point I, *supra*. It, too, was rejected by the court below (R. 586-587). We believe that the decision in this respect also warrants review, since it is a construction of doubtful validity on an important aspect of an important federal statute.

Section 7, *supra*, p. 3, provides that in cases under the Act no temporary injunctive orders shall issue—

> "except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined"—

against the specified losses, expenses and damages. This is comprehensive, clear, language: a complainant, as a

condition of securing any temporary relief, must *undertake* to make defendants whole if they are wrongfully enjoined. We submit that defendants are entitled to recover on that undertaking—that promise.

The court below denied recovery on this basis by refusing to read the statute literally. It said that "an undertaking *with* adequate security" is simply a bond (R. 586-587). The clear distinction in the statute between the "undertaking" on the one hand, and the "adequate security" on the other is ignored. Under Section 7, the "undertaking" is the promise required of the complainant to pay all of the specified expenses and damages; the "adequate security" is simply the assurance to the defendant that the "undertaking" will be performed at the conclusion of the litigation. The "undertaking" requires no action by the court; the "adequate security", since it must necessarily be in a fixed dollar amount, must be determined in advance, and hence Section 7 provides that it is to be "in an amount to be fixed by the court".

The court below, in seeking to justify its refusal to permit recovery on the "undertaking", stated that "the bond should be the evidence and the measure of the plaintiff's liability and the defendant's protection" (R. 586). There is no suggestion in the statute, however, that Congress was concerned with according to *plaintiffs* a price ceiling, a limited liability, on erroneous injunctions; rather, the whole background and tenor of the Act make it apparent that Congress was concerned with affording *defendants* full protection against abuses of the federal injunctive process. That is the fundamental premise upon which the whole Norris-LaGuardia Act is based. That is the conclusion which is indicated

by the legislative history of Section 7.[5] That is the result indicated by state statutes contemporaneous with the Norris-LaGuardia Act. At the time the Act was passed, several states accorded defendants wrongfully enjoined full recovery of all losses or damages which they had sustained.[6] It can scarcely be doubted that Congress, in the Norris-LaGuardia Act, intended to give to defendants wrongfully enjoined in labor disputes the most complete protection known to American equity practice. The restrictive view adopted by the court below literally emasculates Section 7 of the statute.[7] As this Court stated in *Bird* v. *United States*, 187

[5] The House Bill, H. R. 5315, originally omitted the words "in an amount to be fixed by the court". They were added by the House Committee, and adopted in the conference report with the following statement (H. Rep. No. 821, 82d Cong., 1st Sess., p. 7):

> "The second subdivision of Section 7 of the House bill expressly gives the court the power to fix the *amount of the security* in the undertaking filed by the complainant".

Thus the clear distinction between the "undertaking" and the "adequate security" was recognized; the security is subject to the court's control, while the undertaking is simply the statutory promise that the defendant will be made whole if the injunctive order turns out to have been erroneously issued.

[6] *Kohlsaat* v. *Crate*, 144 Ill. 14, 32 N. E. 481; *Officer* v. *Morrison*, 54 Ore. 459, 102 Pac. 792; *Johnson* v. *McMahan*, 40 S. W. (2d) 920 (Tex. Civ. App.); *Corpus Christi Gas Co.* v. *City of Corpus Christi*, 46 F. (2d) 962 (C. C. A. 5th), construing Texas law; *Houghton* v. *Grimes*, 103 Vt. 54, 151 Atl. 642.

[7] The protection of Section 7 is, in fact, most necessary in just those cases in which the court below rules it wholly ineffective. When a plaintiff in a labor dispute manages to convince a lower court, erroneously, that the Norris-LaGuardia Act does not apply at all, none of the substantive and procedural protection afforded to defendants by that Act are available. It is in just such a case that the defendants should be accorded at least the full protection against losses and damages resulting from the erroneous injunction. Yet as construed by the court below, it is in just this situation that the Act becomes ineffective to protect the defendants.

U. S. 118, 124, there is a "presumption against a construction which would render the statute ineffective or inefficient".

Finally, that is the conclusion indicated by the only judicial opinions on the issue. In *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830 (E. D. Mich.), the court, after reviewing Section 7, stated: "I take this to mean that defendants are entitled to recover all damages and all reasonable expenses caused them by this suit." And in *Houston & N. T. M. F. Lines* v. *Local No. 745*, 27 F. Supp. 262, 264 (N. D. Texas), the court stated of Section 7 (in a dictum, because recovery was denied due to failure of proof): "It could hardly mean that expenses were to be allowed, only, if the bond were given."

III

The questions involved are important

It is unnecessary to elaborate on the importance of the Norris-LaGuardia Act in the structure of labor's bill of rights. Nor is it necessary to dwell on the importance of Section 7 as an integral part of that Act. Congress recognized that despite all safeguards, erroneous injunctions would still be issued, and Congress included Section 7 as a means for according adequate reparations to those who might still be subjected to erroneous restraints. To give to Section 7 a construction which would result in less than full indemnity would make it ineffective, and would distort the clear purpose of Congress in enacting it. As the court stated of Section 7 in the *Houston* case, *supra*, "A liberal construction, though, should be allowed, to accomplish its purpose". Yet if the lower court is correct in the instant case, Section 7 added very little to the protection of defendants which was not available before its enactment.

Moreover, it nullifies the liberal construction which has been given to Section 7 by the District Courts to which the litigation on Section 7 has heretofore been confined.

Indeed, the fact that this is the first case involving Section 7 which has reached an appellate court in the course of more than 12 years indicates a characteristic of litigation under Section 7 which cannot be ignored. Few cases warrant an appeal; the District Court decisions are perforce accepted as final. Here, the protracted nature of the litigation, and the enormous expense to which the defendants were put in finally ridding themselves of erroneous restraining orders warranted review by appellate courts. Another such case may not arise for another dozen years. It is doubly important, therefore, that this Court now review the issues, and authoritatively determine, for the future guidance of District Courts, whether the effectiveness of Section 7 has not been improperly limited by the court below. Certainly the trend of judicial construction of the section has been abruptly reversed, for on both points stated above, there are District Court decisions squarely opposed to the result now reached. For this reason, as well as because of the conflict of decisions under Point I, *supra*, the writ now prayed for should be granted.

CONCLUSION

Wherefore, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit be granted.

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March, 1945.

APPENDIX

McNamara v. *Calvin*, unreported, No. 11,524, U.S.D.C., ND. Ill., E. D.

The facts are stated in 1 *U. of Chi. L. Rev.* 328 to be as follows:

> "* * * A bill for temporary restraining order and for injunction, dated March 9, 1932, alleges that complainant, a citizen of Michigan, was engaged in interstate trucking between points in Michigan, Illinois, and Wisconsin; that he made local deliveries and pick-ups of interstate shipments directly with the interstate trucks, without using terminal facilities in Chicago; that defendants, citizens of Illinois and officers of the Chicago Teamsters Union and of a company which operated a trucking-delivery terminal in Chicago, desired that complainant stop local deliveries and pick-ups and make use of the Chicago terminal at the usual charges; that, in order to compel complainant to do this, defendants by threats and other intimidations interfered with complainant's employees, and threatened complainant with physical violence and with material damage to his business; that complainant therefore stopped his local operations and was prevented from fulfilling certain contracts, thereby suffering damages in excess of $3,000.
>
> "A temporary order restrained defendants from (1) interfering with complainant's business or property or his contracts, employees, or equipment, (2) preventing local deliveries and pick-ups without the use of the Chicago terminal, (3) interfering even by persuasion with complainant's employees in the performance of their duties in complainant's interstate business or (4) interfering in any way with complainant's handling of goods in interstate commerce.

"Under the requirement of Section 16 of the Clayton Act, complainant filed a bond (with surety) in the sum of $1,000, conditioned upon payment to defendants of 'all damages which may be sustained * * * by reason of the wrongful issuance of * * * restraining order and/or injunction and also such costs and damages as shall be awarded against the said complainant in case said restraining order and/or injunction shall be dissolved.'

"On April 1, 1932, no answer having been filed, a premliminary injunction in substantially the same terms as those of the order was issued, and the bond was continued without change. Defendants thereafter filed separate answers (one for the union group and one for the terminal group) and afterwards moved dissolutions of the temporary injunction. After several continuances the injunction was dissolved and the bill was dismissed on November 4, 1932, *upon motion of complainant.* Shortly thereafter, the terminal group of defendants filed a suggestion of damages, claiming attorneys' fees as damages under the bond, because of the provision of Section 7 of the Norris Act of March 23, 1932. Demurrer to the suggestion was sustained as to fees earned prior to March 23, and overruled as to fees earned after that date to November 4, and upon hearing judgment was given for defendants in the sum of $1,000 for fees incurred between March 23 and November 4, the court refusing to admit proper evidence as to the reasons for the dismissal of the bill on complainant's motion."

The unreported opinion of Judge George E. Q. Johnson upon the suggestion for damages and complainant's demurrer thereto, which was copied from the file of the cause No. 11,524, U. S. D. C., N. D. Ill., E. D., is as follows:

"The matter comes on to be heard before the Court on hearing of suggestions of damages filed

by the defendant, growing out of dissolution of an injunction granted on motion of the plaintiffs. Defendants waived damages except as to attorney's fees. A temporary restraining order had been entered and on April 1st, the same was ordered to stand as a preliminary injunction, and the Court entered a proper order that the bond of $1,000 given at the time of the issuance of the temporary restraining order 'should stand and remain in full force and effect until the further order of this Court.'

"On March 23, 1932 the so-called Norris Anti Injunction Bill was signed by the President. Prior to that time damages in the nature of attorney's fees had been denied by the courts. The Norris Act expressly provided that attorney's fees should be allowed. That was the law on the date the bond was ordered to stand. If the surety objected it had a right at that time to withdraw from the bond. The bond then stood with the Act of March 23, 1932 written into it. The principal of course would be liable irrespective of the liability of the surety on the bond.

"The Court holds as a matter of law that the plaintiffs are not liable in damages for attorney's fees which accrued prior to March 23, 1932, but are liable for damages for attorney's fees which have accrued subsequent to March 23, 1932, and the defendants may offer evidence in support of their suggestions for damages which arose by way of attorney's fees for services rendered subsequent to March 23, 1932."

(24)

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1087.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL., PETITIONERS,

VS.

DONNELLY GARMENT COMPANY, A CORPORATION; DONNELLY GARMENT SALES COMPANY, A CORPORATION; DONNELLY GARMENT WORKERS' UNION ET AL., AND CENTRAL SURETY AND INSURANCE COMPANY, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion in the District Court (R. 542-567) is reported at 55 F. Supp. 572. The opinion in the Circuit Court of Appeals (R. 575-593) is reported at 147 F. 2d 246.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 19, 1945 (R. 593). The petition for certiorari was filed March 28, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether three injunction bonds—two conditioned under Section 18 of the Clayton Act and the third under Equity Rule 74, in strict compliance with judicial orders prescribing their terms—are to be construed as written, or are to be construed by incorporating therein the additional and differing provisions of Section 7 of the Norris-LaGuardia Act.

2. Whether the bonds are to be ignored altogether and the liability of respondents determined according to Section 7 alone.

STATUTES AND EQUITY RULE INVOLVED.

Section 18 of the Clayton Act (Act of October 15, 1914, 38 Stat. 738, 28 U. S. C., Sec. 382), under which two of the bonds were given, provides as follows:

> "Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby."

Equity Rule 74, under which the third bond was given, provided as follows:

> "*Injunction pending appeal.* When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

Section 7 of the Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. 70, 29 U. S. C., Sec. 101, *et seq.*), under which none of the bonds was given, provides, in part, as follows:

> "* * * No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> "The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But noth-

ing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

STATEMENT.

The opinion of the Circuit Court of Appeals contains a concise statement of the case containing all that is material to the consideration of the questions presented here (R. 576-581, 584-6; 147 F. 2d 248-250, 251-2). That statement is not challenged by petitioners. We therefore substantially adopt it, as follows (referring to the parties as they were designated in the District Court):

This action began with a motion of the defendants in the case of *Donnelly Garment Company et al.* v. *International Ladies' Garment Workers' Union et al.* for a hearing to assess damages and expenses caused defendants by the alleged erroneous issue and continuance of certain injunctive orders issued by the district court in the case mentioned, and for a decree against the plaintiffs, the intervener, and the surety on their injunction bonds for the amount of defendants' damages and expenses determined by the court (R. 5). Under the order of the district court made upon the motion (R. 7), the defendants filed a bill of complaint setting forth their claims (R. 8-15); the plaintiffs, the intervener and the surety answered (R. 20-30); and the matter was heard on evidence before the district court, which awarded judgment in favor of defendants in the sum of $2,000 (R. 44-5). The defendants appealed (R. 45).

In order to understand the issues arising on the appeal, it is necessary briefly to state the history of the litigation in which the restraining orders and injunctions were issued. On July 5, 1937 the Donnelly Gar-

ment Company, a corporation engaged in the manufacture of women's garments in Kansas City, Missouri, and the Donnelly Garment Sales Company, a subsidiary handling the sales of the garment company's products, brought an action in the United States District Court for the Western District of Missouri to enjoin the International Ladies' Garment Workers' Union, its officers and agents, and a number of its employees from picketing, boycotting, and through violence and fraud interfering with plaintiffs' business, employees, and customers, in the furtherance of a conspiracy in violation of the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 1 *et seq.* Among the individual defendants were residents of Missouri and of other states. The jurisdiction of the Federal court was grounded exclusively upon the Sherman Act (Dft. Ex. 152, p. 15, R. 78).

On the filing of the complaint the district court issued a temporary restraining order, returnable in five days (R. 182). The court required and the plaintiffs and the surety gave a bond on the restraining order in the sum of $2,000, conditioned to pay defendants "such costs and damages as may be incurred or suffered by reason of the wrongful issuance of said restraining order or injunction should it be thereafter dissolved or it be decided that said temporary restraining order was wrongfully obtained." (R. 186-7).

On the return day the defendants moved to dismiss the bill and vacate the restraining order. The ground for this motion was that the controversy alleged in the bill involved a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 101 *et seq.*, and that, by virtue of that Act, a Federal court was without jurisdiction to issue a restraining order or a temporary or permanent injunction on the allegations of the complaint (R. 188-191). On August 13, 1937 defendants'

motion was denied, the district court saying in its opinion (20 F. Supp. 767, 768) that the defendants, conceding that the court formerly had jurisdiction of the action set out in the complaint, contended that its jurisdiction had been taken away by the Norris-LaGuardia Act. The temporary restraining order was by the court continued in effect with the consent of the parties until the ruling on plaintiffs' application for a temporary injunction. (R. 191-2).

After these proceedings the Donnelly Garment Workers' Union, an organization of the plaintiffs' employees, was permitted to intervene in the case (Dft. 141, p. 42), alleging that it included in its membership all of the employees of the Donnelly Garment Company, by which it had been recognized as the agency for collective bargaining between the company and its employees, and that contracts between it and the plaintiff company concerning rates of pay and hours and conditions of work had been made. The intervener joined in the prayer of the bill of complaint for an injunction restraining the defendants from the acts charged in the complaint, and further asked that the plaintiffs be enjoined from abrogating their contracts with the intervener and from attempting to coerce or compel the members of the intervener organization to join the International Union. The intervener denied that a labor dispute was involved in the controversy set forth in the original bill, asserted that neither the Norris-LaGuardia Act nor the National Labor Relations Act (29 U. S. C. A., Sec. 151 *et seq.*) was applicable on the issues involved, and alleged the unconstitutionality of both Acts if interpreted to apply in the situation before the court. (Dft. 141, pp. 43-55, R. 68).

Because of the allegations in the intervening petition concerning the unconstitutionality of the Norris-

LaGuardia Act and the National Labor Relations Act, defendants conceived the idea that an injunction was sought against the operation of an Act of Congress within the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. A., Sec. 380a (Dft. Ex. 141, p. 70; R. 193). Accordingly, on their suggestion, a three-judge court was empaneled (Dft. Ex. 141, pp. 70-72; R. 194-6), and plaintiffs' application for a temporary injunction and defendants' motion to dismiss came on for hearing before that court (Dft. Ex. 141, p. 88). The issue was the same as that presented to the district court on the temporary restraining order, the court stating in its opinion (21 F. Supp. 807, 809) that the only ground of defense relied upon by defendants was the contention that the Norris-LaGuardia Act applied and deprived the district court of jurisdiction. This contention the court overruled (21 F. Supp. 807; Dft. Ex. 142, p. 903). The temporary injunction was granted effective December 31, 1937 (Dft. Ex. 141, p. 108; R. 197). The court required and the plaintiffs intervener and surety gave a bond in the sum of $10,000, conditioned to pay all "such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary injunction if it be finally held that said temporary injunction was improvidently granted" (R. 200, 203).

From the above order defendants took a direct appeal to this Court (Dft. Ex. 141, pp. 112, 116; R. 205), which held that the case was not one for a three-judge court within the Act of August 24, 1937; and, by its order of May 16, 1938, dismissed the appeal at the cost of the defendants, vacated the temporary injunction, and remanded the case for further proceedings in the district court. (304 U. S. 243, 251; R. 205-6).

Plaintiffs amended their bill, and intervener amended its petition, by alleging facts which, in their belief, sustained the jurisdiction of the district court in the event it should be determined that the controversy involved a labor dispute as defined by the Norris-LaGuardia Act, reserving their contention that the Act was not applicable and that no labor dispute was involved (Dft. Ex. 152, pp. 36-38; R. 210). The defendants renewed their motion to dismiss on the same ground as that advanced at previous hearings (R. 210). The district court reached the conclusion that the controversy between the parties involved a labor dispute, and that the plaintiffs' bill failed to allege that plaintiffs had made every reasonable effort to settle the dispute, the Norris-LaGuardia Act requiring such an effort as a condition precedent to the granting of a restraining order, and that for this reason the complaint and intervening petition should be dismissed and the temporary restraining order vacated (23 F. Supp. 998, 1001). On motion of the plaintiffs, the district court on July 18, 1938 resurrected the original restraining order, modified it in certain particulars, and, as modified, continued it in effect pending an appeal, on condition that the plaintiffs execute a bond to defendants in the sum of $25,000 (R. 213-217). This bond was executed by plaintiffs, intervener and surety and, as required and approved by the court, was conditioned as follows (R. 217-218):

> "The condition of the above obligation is such that, whereas, the temporary restraining order heretofore issued in this cause is continued as modified on this 18th day of July 1938, pending appeal of this cause, now, therefore, if the obligors and each of them shall well and truly pay all costs, damages and expenses, including attorneys' fees, suffered by defendants or any of them, by reason of the improvident or erroneous issuance or continuance of said

restraining order, then this bond shall be void, otherwise to remain in full force and effect."

On this appeal the Circuit Court of Appeals reversed. In its opinion (99 F. 2d 314) the court pointed out that at the time this action came on for hearing before the three-judge court, the question whether a labor dispute was involved was a debatable one. It held, however, that the question had been settled by decisions of this Court handed down after the hearing before the three-judge court, and that a labor dispute was involved in the controversy within the meaning of the Norris-LaGuardia Act. It overruled the action of the district court in disposing of the case upon the pleadings, holding that the question whether the plaintiffs failed to use every reasonable effort to settle the labor dispute was a question of fact to be determined from the evidence adduced at a hearing on the merits (99 F. 2d 317). The mandate on reversal was filed in the district court on January 28, 1939 (R. 221).

The case went to trial on its merits and on April 27, 1939 a permanent injunction was granted (Dft. Ex. 152, pp. 129-134). On appeal to the Circuit Court of Appeals the permanent injunction was vacated, the decree of the district court reversed, and the case remanded with directions to dismiss the complaint for want of jurisdiction (119 F. 2d 892). The Circuit Court of Appeals was of the opinion that the findings of the trial court concerning the activities of defendants were sustained by the evidence (p. 898), but that, since there was no proof to show that the enjoined activities of the defendants either in purpose or effect tended to control the interstate market of plaintiffs' product to the detriment of consumers, they were not proscribed by the Sherman Act. *Apex Hosiery Company* v. *Leader et al.*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044.

On rehearing (121 F. 2d 561) the Circuit Court of Appeals modified its decree and mandate by remanding the case to the district court with permission to the plaintiffs to apply to that court for leave to dismiss as to resident defendants and to amend the complaint to show jurisdiction based upon diversity of citizenship and to state an action under the law of Missouri. This procedure was followed, and on a trial *de novo* on the complaint, as amended, against the nonresident defendants, the district court denied any injunctive relief on grounds not here important (55 F. Supp. 587). Plaintiffs and intervener, however, have appealed from that judgment.

In the instant proceeding the defendants neither alleged nor proved any damage to them as the result of the restraint imposed upon them by any of the orders set out above. Instead, they sought the recovery only of expenses incurred in opposing the various injunctive orders secured by the plaintiffs and intervener. The evidence establishes that all of these expenditures were made by the International Ladies' Garment Workers' Union, the total of all of them amounting to $102,913.57 made up of attorneys' fees, attorneys' disbursements, stenographic fees, photostats, printing, office rent, and miscellaneous items. Since it had been determined that the action in which the injunctive orders were issued involved a labor dispute and that all of the restraining orders and injunctions were erroneously issued because of want of jurisdiction, defendants asserted that plaintiffs were liable to them for the whole amount of their expenses, that the intervener was jointly liable with the plaintiffs to the extent of $97,055.52, and the surety on the various injunction bonds was liable to the extent of $37,000, the total of the penal sums of the three bonds. This result, defendants contended, was compelled by Section 7 of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 107.

In its findings (R. 37), conclusions of law (R. 44) and opinion (55 F. Supp. 572; R. 543-566), the district court adopted the premise that all of the restraining orders and injunctions were erroneously issued because beyond the jurisdiction of the court which issued them. It also held that the restraining order of July 5, 1937 remained in effect until December 31, 1937, the date when the temporary injunction granted by the three-judge court became effective (*Houghton* v. *Meyer*, 208 U. S. 149); that the temporary injunction granted by the three-judge court remained in effect from December 31, 1937 to May 16, 1938, the date of its vacation by the Supreme Court of the United States. It reached the conclusion that on July 18, 1938, when the district court modified the original restraining order and continued it in effect pending appeal to the circuit court of appeals, the original restraining order, as a matter of law, had long since expired, but by the order of July 18, 1938 was revived and continued in effect from that date until January 28, 1939, when the mandate of the circuit court of appeals on the appeal was filed in the district court. It also concluded that at the time of the defendants' motion on February 7, 1939, to vacate the modified restraining order of July 18, 1938, the restraining order sought to be vacated had long since expired because, by the order of July 18, 1938 it was continued in effect only pending appeal to the circuit court of appeals, and the mandate of that court on the appeal had been filed on January 28, 1939.

The district court denied all of defendants' contentions relative to the construction of Section 7 of the Norris-LaGuardia Act and concerning its application in the case. It held that the liability of the plaintiffs and intervener on each of the restraining orders and injunctions granted in the case must be determined by the conditions expressed in the injunction bonds and limited by the amount of the penalty of the bonds. This holding

resulted in the denial of any recovery by defendants for expenses incurred in resisting the permanent injunction of the district court, on which no bond was required, and also in holding that since there were three separate temporary injunctive orders granted, each in effect for a different period, the defendants were required to establish by the evidence the part of the expenses incurred by them allocable to each injunctive order. The district court found it unnecessary to decide what part of the expenses claimed by the defendants was reasonable. It pointed out, however, that many of the items for which recovery was sought were wholly unnecessary and improvident. (For example, the item of expense incurred as a result of defendants' action in causing a three-judge court to be organized and in appealing to the Supreme Court of the United States from its judgment, and the expense caused by motions to dissolve the temporary orders which were not in effect at the time of the motions.) It was of the opinion on the whole case that in equity each party might properly be required to bear its expenses resulting from the litigation, but it felt compelled, in view of the condition of the $25,000 bond regarding the payment of attorneys' fees and expenses, to allow the defendants their reasonable expense incurred on the motion to vacate the temporary restraining order of July 5, 1937. It denied recovery on either the $2,000 bond on the restraining order of July 5, 1937, or upon the $10,000 bond on the temporary injunction granted by the three-judge court, and found that $2,000 was a reasonable allowance to defendants for expenses and attorneys' fees, recoverable on the bond for $25,000.

On the appeal from this judgment the Circuit Court of Appeals by a unanimous opinion affirmed (R. 575-594). Defendants' petition for certiorari presents two main points, which we discuss in the order presented.

ARGUMENT.

I.

The decision of the court below did not refuse to construe the bonds in the light of the applicable statute, and is not in conflict with the decisions of this Court or of other Circuit Courts of Appeals.

Defendants contend that Section 7 of the Norris-LaGuardia Act was the "applicable statute," and that the District Court and Circuit Court of Appeals erroneously refused to read into the bonds the language of that statute. This contention is completely answered by the opinion of the Circuit Court of Appeals, which said (R. 587-9):

> "Nor may the words of Section 7 of the Norris-LaGuardia Act be read into the bonds, since it is beyond question that the bonds in this case were not required by the court nor given by the plaintiffs pursuant to the provisions of the Norris-LaGuardia Act. The rule that the language of a statute requiring a bond in a certain form must be read into any bond made pursuant to the statute is frequently applied in cases where the principal on the bond applies for and receives the contract, privilege, or benefit authorized by the statute on the condition expressed in the statute that the principal execute a bond in the terms provided by the statute. In such cases the person from whom the bond is required is conclusively presumed to have intended to execute the bond in the amount and upon the conditions demanded by the statute, the benefit of which he accepts; the language of the statute is written into the bond, though omitted by inadvertence or intention. The cases relied on by defendants on this point are of this char-

acter. For example, see *United States* v. *Hartford Accident and Indemnity Co.*, 2 Cir., 117 F. 2d 503; *Heiser* v. *Woodruff*, 10 Cir., 128 F. 2d 178. The rule can not be applied in the present case. The issue before the courts on both the temporary restraining order and the temporary injunction was whether the Norris-LaGuardia Act controlled or the Sherman Act, as amended by the Clayton Act. If the Norris-LaGuardia Act controlled, the courts were required to demand of the plaintiffs bonds conditioned to pay the reasonable expenses and attorneys' fees of defendants, incurred in resisting the order granted or any other order of injunction granted and subsequently denied by the court. If the Clayton Act controlled, the courts were required to exact from plaintiffs bonds conditioned to pay only such costs and damages as the defendants sustained by reason of the wrongful issuance of the restraining order or temporary injunction. 38 Stat. 738, 28 U. S. C. A., Sec. 382. Necessarily, when the courts decided that their jurisdiction on the question before them was limited only by Section 20 of the Clayton Act, they also decided that the bonds required of the plaintiffs should be conditioned in accordance with the provisions of that Act. Accordingly, in each instance the courts ordered bonds conditioned exactly as Section 18 of the Clayton Act required. The bond for $25,000 given on the appeal from the decree of the district court dismissing the action was required by the court under Equity Rule 74, and not pursuant to the Norris-LaGuardia Act. The fact that the decrees under which the bonds were given were erroneous does not entitle the defendants to recover the expenses and attorneys' fees incurred by them in resisting the decrees, nor in securing their reversal and the ultimate vacation of the orders issued in conformity with the decrees. The loss, if any, caused defendants by the errors of the court is *damnum absque injuria*, one of the unavoidable incidents of litigation to which parties are exposed. *United Motor Service, Inc.*, v. *Tropic-Aire, Inc.*, 8 Cir., 57 F. 2d 479, at p. 483.

"It follows from the authorities cited that the district court was correct in holding that the defendants could not recover on any bond an amount in excess of the penalty of the bond nor for any liability except that stipulated in the bond. See and compare *Tenth Ward Road District* v. *Texas and Pacific R. Co.*, 5 Cir., 12 F. 2d 245, 45 A. L. R. 1513; *Minneapolis, St. Paul, and S. S. M. R. Co.* v. *Washburn Lignite Coal Co.*, 254 U. S. 370, 41 S. Ct. 140, 65 L. Ed. 310; *United Motor Service, Inc.*, v. *Tropic-Aire, Inc., supra.*"

This ruling does not conflict with any decision cited by defendants (pp. 15-17) except the unreported decision of a district judge in *McNamara* v. *Calvin.** This memorandum opinion cites no authority, and manifestly conflicts with decisions of this Court uniformly holding that liability in a case like this must be determined and measured by the terms of the bond actually filed. *Houghton* v. *Meyer*, 208 U. S. 149, 157; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228, 233; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Washburn Lignite Coal Co.*, 254 U. S. 370, 374; *Meyers* v. *Block*, 120 U. S. 206, 211; *Russell* v. *Farley*, 105 U. S. 433, 437; *Bein* v. *Heath*, 12 How. 168, 179. In *Houghton* v. *Meyer, supra*, this Court said:

"But we do not think the case can be decided upon conjecture as to what bonds *might have been* required. We must determine the case upon the liability of the principals and sureties on the bond *which was actually given.*" (Italics supplied.)

In *Lawrence* v. *St. Louis-San Francisco Ry. Co., supra*, this Court said:

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*The opinion in **McNamara v. Calvin** may be found only in the appendix to defendants' brief, where it is preceded by a purported statement of the facts, taken, not from the opinion, but from an article appearing in a law review.

> "If it had not, when entering the interlocutory decree, required that bond be given, *no damages could have been recovered* on the dissolution of the injunction." (Italics supplied.)

In *Meyers* v. *Block*, *supra*, this Court said:

> "* * * Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. *It is only by reason of the bond, and upon the bond, that he can recover anything.*" (Italics supplied.)

Defendants argue that the requirement of a bond in Section 7 of the Norris-LaGuardia Act is mandatory. So also is the similar requirement of Section 18 of the Clayton Act; yet after the enactment of the Clayton Act Justice Brandeis for the unanimous Court continued to hold that liability is dependent upon the bond actually filed. *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, *supra*. To the same effect are other cases decided since the Clayton Act. *Berger Mfg. Co.* v. *Huggins*, 242 Fed. 853, 857 (C. C. A. 8); *United Motors Service, Inc.*, v. *Tropic-Aire, Inc.*, 57 F. 2d 479, 482 (C. C. A. 8); *Tenth Ward Road District* v. *Texas & Pacific Ry. Co.*, 12 F. 2d 245, 247 (C. C. A. 5), and *Becker* v. *Stander*, 17 F. 2d 772, 773.

Other decisions with which defendants (at pp. 15-16) claim that the decision below conflicts are those dealing with *non-judicial* statutory bonds, such as a bond securing performance of a public building contract, *Hill* v. *American Surety Co.*, 200 U. S. 197; bond required from a war veteran seeking a duplicate adjusted service certificate in place of a lost certificate, *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. 2d 503 (C. C. A. 2); and bond given to secure extension of time for payment of income tax, *United States* v. *Hamilton*, 96

F. 2d 878, 880 (C. C. A. 7). These cases are distinguishable because (a) not one was an injunction case dealing with an injunction bond with terms and penalty fixed by a court; (b) in each case the bond was avowedly and designedly furnished in purported compliance with the statute involved in the particular case, and (c) in each case the statute was self-executing and bound the bond-giver, directly, to give a bond in certain specified terms.

For similar reasons the decisions of state courts cited by defendants (at p. 16) are distinguishable. Conflict with state court decisions, even if present, would of course be wholly irrelevant on petition for certiorari.

Heiser v. *Woodruff*, 128 F. 2d 178 (C. C. A. 10), instead of supporting defendants' position is squarely opposed to it. The court there held that attorney's fees were not recoverable under the injunction bond given.

The case of *Hays* v. *Fidelity & Deposit Co.*, 112 Fed. 872 (C. C. A. 5), did no more than apply the state rule of Louisiana, which was that the obligor's liability depends on the law and not on the form of the bond. Be that as it may, the federal rule is that the terms of the bond are controlling.

It is apparent that the decision below does not conflict with any of the foregoing cases, save and except only *McNamara* v. *Calvin* (unreported).

Other decisions cited by defendants (at p. 17) merely hold that laws regulating the validity, performance and enforcement of a contract enter into and form a part of it. The decision below certainly does not conflict with that settled principle.

Defendants say (p. 17) that "statutes do not, ordinarily at least, apply only if someone purports to obey them." That is true. But it is also true that when a

court is called upon to decide whether an injunction bond shall be conditioned according to one or the other of two statutes, and makes the decision, and specifies the terms of the bond to be given (as here), the applicant for injunctive relief has no alternative but to give bond in the form specified. This is elementary. *Jones* v. *Gray*, 91 Ill. App. 79, 81.

Defendants say (p. 17) that by "inducing error" in the applicability of the Norris-LaGuardia Act plaintiffs and intervener escaped "the liability Congress intended to impose upon them by Section 7." The short answer is that plaintiffs and intervener induced no error; they submitted to the terms laid down by the District Court and gave bonds precisely embracing those terms.

Defendants in effect argue that the courts below should have reformed the bonds to embrace terms never fixed by the District Court and never agreed to by plaintiffs, intervener or the surety. Defendants in effect argue for a retroactive determination of liability, *ex post facto*, upon contractual terms never consented to by the obligors—terms never even presented to the obligors for acceptance or rejection. But it was too late for reformation of the bonds. If defendants were not satisfied with the terms of the bonds when specified or given, defendants had an ample remedy—first, by motion to require a different form of bond (*Goldmark* v. *Kreling*, 25 Fed. 349; *Standard Bonded Warehouse Co.* v. *Cooper*, 30 F. 2d 842, 845; 32 C. J. 317); and, if that motion failed, then, second, by petition to the Circuit Court of Appeals for mandamus (38 C. J. 643). Defendants pursued neither remedy and clearly waived any objection to the form of the bonds. *Jones* v. *Gray*, 91 Ill. App. 79, 81; *Hathorn* v. *Natural Carbonic Gas Co.*, 137 App. Div. 551,

121 N. Y. Supp. 683, 686; *Young Chun* v. *Robinson*, 21 Hawaii 193, 196.

To summarize: The court below in substance ruled that when the obligors in good faith executed bonds in terms fixed by the District Court under the Clayton Act and Equity Rule 74, the obligors were justified in assuming that the terms would remain constant, that the extent of the risk they had assumed was settled and would not later be expanded to include a liability predicated on another statute—certainly not without a motion for such a change of liability followed by a hearing and ruling of the court thereon. This ruling not only was sound law but was good morals as well. Certainly, it does not conflict with any decision of this Court or of another Circuit Court of Appeals. It is respectfully submitted that defendants' Point I is without merit.

II.

The court below correctly refused to allow defendants to recover under Section 7, regardless of the bonds.

Defendants' position is that although the District Court's orders specifically prescribed the terms of each bond, and although plaintiffs and intervener in giving the bonds meticulously complied with these orders of the court, the bonds thus given are now to be treated as so much waste paper and recovery is to be determined regardless of their terms. Defendants thus seek not merely to "change the rules in the *middle* of the game," but to change the rules *after the game has ended.* This shocking contention is completely answered by the opinion of the Circuit Court of Appeals, which said (R. 586-7):

> "All of defendants' contentions concerning the construction and controlling effect of Section 7 of

the Norris-LaGuardia Act must be rejected. There is no ambiguity in the section and no room for construction. *United States* v. *Missouri-Pacific R. Co.*, 278 U. S. 269, 277, 49 S. Ct. 133, 136, 73 L. Ed. 322. 'An undertaking with adequate security' is, in common usage and in the language of the law, a bond. Webster's International Dictionary, 'Undertaking.' The requirement of a bond as a condition precedent to an order for temporary injunctive relief is directly opposed to the notion that the Act is self-executing and that the liability of a plaintiff to a defendant on an erroneous order of restraint is measured by the defendant's expenditures in vacating the order, without regard to the amount stipulated in the bond and fixed by the court in conformity with the Act. We may not suppose that Congress, in imposing upon the court the duty of determining the amount of security adequate to the protection of a defendant, and just to a plaintiff, intended that the court's determination should be wholly ineffectual and without meaning as the measure of plaintiff's liability upon his undertaking. We think the statutory requirement of a bond, upon certain conditions, in an amount to be fixed by the court is conclusive evidence of the legislative intention that the bond should be the evidence and the measure of plaintiff's liability and defendant's protection. In this there is nothing inconsistent with an intention on the part of Congress to provide for labor unions and their members the widest possible protection against erroneous and improvident injunctions. Necessarily, at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate. It may be fixed in a sum which the event proves inadequate or excessive. If the security required by the court becomes inadequate while the restraint continues and the litigation proceeds, a defendant has ready to hand the means for his protection by a motion for an increase in the amount of the security. If we concede that the rights of the parties in the present

action are controlled by Section 7 of the Norris-La-Guardia Act, defendants are nevertheless not entitled to recover in excess of the total of the penalties of the bonds required by the court, since at no time in the present litigation did they complain either of the conditions of the bonds or of the amount of the security determined to be adequate by the courts which required them. The weight of authority in the Federal courts is that a recovery in excess of the maximum amount stipulated in a judicial bond is not permissible. *United Motor Service, Inc.*, v. *Tropic-Aire, Inc.*, 8 Cir., 57 F. 2d 479, 482, reviewing the prior decisions of this court and other Federal courts. And see *Russell* v. *Farley*, 105 U. S. 433, 437, 26 L. Ed. 1060; *Meyer* v. *Block*, 120 U. S. 206, 211, 7 S. Ct. 525, 30 L. Ed. 642; *Lawrence* v. *St. Louis-San Francisco R. Co.*, 278 U. S. 228, 233, 49 S. Ct. 106, 73 L. Ed. 282."

Defendants do not challenge this obviously sound ruling as in conflict with any decision of this Court or of another Circuit Court of Appeals. They claim that there is conflict with two District Court decisions. This would be irrelevant if true. But there is no real conflict. While in *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830, 831, the Court said that Section 7 means that "the defendants are entitled to recover all damages and all reasonable expense caused them by this suit," that language must be construed in light of the facts there held in judgment—which were that the damages proved and allowed were plainly within the terms and penalty of the bond given. In *Houston & North Texas M. F. Lines* v. *Local No. 745*, 27 F. Supp. 262, 264, the point actually decided was that the defendants in that case were not entitled to any damages. The judge's suggestion that "the statute could hardly mean that expenses were to be allowed only if bond were given," was therefore pure *obiter dictum*, as defendants

concede (p. 21); the statement is unsupported by the citation of any authority, and unquestionably is inconsistent with the rule laid down by this Court in decisions cited (pp. 15-16, *supra*).

Defendants attack the decision below as involving a construction of Section 7 "of doubtful validity." Defendants' own construction is worse than doubtful; it is clearly erroneous. Plainly, Section 7 itself is not self-executing; the section itself imposes no liability upon a plaintiff seeking injunctive relief. It is merely a mandate addressed to the court, to require a bond with certain terms in an injunction suit involving a labor dispute. Liability of plaintiff depends upon the court requiring bond and plaintiff giving it. There would be no object in the court's fixing terms and amount of the bond if in the assessment of damages it is to be wholly ignored, as defendants argue it should be.

Defendants' argument that the "undertaking" is one contract and the "security" another contract is a mere play upon words. The words "undertaking with adequate security in an amount to be fixed by the court" plainly mean a bond with adequate surety in an amount to be fixed by the court. "Undertaking" in Section 7 is commonly referred to as meaning "bond." *Cinderella Theatre Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 830, 831; *Local Union 368* v. *Barker Painting Co.*, 24 F. 2d 879, 880; *Houston & North Texas Motor Freight Lines* v. *Local 745*, 27 F. Supp. 262; *Tri-Plex Shoe Co.* v. *Cantor*, 25 F. Supp. 996. The word "security" no doubt often means "bond," but it also means the "surety" who signs the bond. Compare *Heiser* v. *Woodruff*, 128 F. 2d 178, 179 (C. C. A. 10). For example, Sec. 18, R. S. Mo., 1939, provides that "the court * * * shall take a bond * * * with two or more sufficient securities * * *." Sec. 22, R. S. Mo., 1939, likewise says that the court shall take special care

"to take as securities men who are solvent * * *," and that if "any security has become a non-resident," the court shall require another bond. Similar uses of the word could be multiplied indefinitely.

To adopt defendants' construction of "undertaking" and "security" as meaning two different contracts would lead to this absurdity, among others: The surety, who Section 7 says must sign the "undertaking," would be liable thereon in an *unknown* and *unlimited* amount, *to be determined at the end of the litigation;* yet at the same time he would also be liable on the "security" in the *definite* amount fixed by the court. A construction leading to so fantastic a result simply cannot be sound.

Defendants say (p. 19) that the legislative intent was to afford defendants in a labor dispute full protection against abuse of federal injunctive process. No doubt that is true. But it is also true that the legislative intent in requiring bond in every injunction suit is to protect defendants generally against the same abuse. Nevertheless, the rule still stands, that the terms of the bond actually filed are controlling.

There is nothing in the legislative history of the Norris-LaGuardia Act suggesting any legislative intent to depart from this settled rule. In House Report No. 669 on H. R. 5315 (First Session, 72nd Congress) the House Committee on the Judiciary dealt in detail and at length with all of the innovations in the Act, but as to the bond provision of Section 7 the Committee made only this perfunctory comment:

> "The other provisions of this section hardly require any particular discussion, because they relate to the giving of notice, the length of time that a temporary restraining order shall be effective, the necessity for giving *an undertaking with surety*, the recompense for damages caused by the erroneous is-

suance of injunctions, and the like; all of which are generally considered necessary and reasonable when the extraordinary injunctive arm of the court is brought into play with the serious consequences of injury which the improvident issuance of an injunction frequently produces." (Italics supplied.)

In the face of this reference to the giving of "an undertaking with surety," what becomes of defendants' fantastic suggestion that *two contracts* are required? This casual reference to the bond provision suggests that the House Committee certainly did not regard it as injecting anything inconsistent with the usual provisions of an injunction bond or with the settled principle that the terms of the bond are controlling.

Defendants' argument (p. 20) that House Bill 5315 originally omitted the words "in an amount to be fixed by the court," and that they were substantially inserted, instead of supporting defendants' contention opposes it, for it shows that Congress decided that the plaintiff's obligation (his undertaking to be filed) should be for a fixed penal amount and that the court should determine what that amount should be.

Defendants (p. 20) refer to contemporaneous state statutes according to a defendant full recovery of damages sustained, regardless of any bond. Significantly, in enacting the Norris-LaGuardia Act Congress *did not so provide.*

Defendants (p. 20) argue that the opinion below "emasculates Section 7." That is an inaccurate statement. The opinion, on solid grounds, merely holds Section 7 inapplicable.

It is respectfully submitted that defendants' Point II is without merit.

III.

Petitioners present no question of importance justifying certiorari.

This Court has definitely settled the question of what constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act. *Lauf* v. *Shinner & Co.*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; *Columbia River Packers' Association* v. *Hinton*, 315 U. S. 143; *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50. Inferior federal courts have consistently followed these decisions. No longer is the question of what constitutes a "labor dispute" an open or debatable one.

As to the form of bond required, no court has ever questioned the proposition that in a suit involving a labor dispute a federal court upon the issuance of a restraining order or temporary injunction must require a bond conditioned according to Section 7 of the Norris-LaGuardia Act. No court has ever held otherwise and there is no likelihood that any court ever would hold otherwise.

It results that the questions presented in the case at bar (which originated before the decision in the Lauf Case) in all reasonable probability will never arise hereafter. So there is presented here no "special and important reason" for review by certiorari. Rule 38.

Defendants say (p. 22 of their brief) that "the trend of judicial construction" of Section 7 has been "abruptly

reversed" for the reason that "there are District Court decisions squarely opposed to the result now reached." It is submitted that the unreported decision in *McNamara* v. *Calvin* and the dictum in *Houston & North Texas Motor Freight Lines* v. *Local 745*, 27 F. Supp. 262, 264, can hardly be said to have established a "trend." Moreover, conflict with these district court cases is not important, in view of the undeniable fact that the decision below is in harmony with the unbroken line of decisions by this Court and Circuit Courts of Appeals (cited pp. 15-16, *supra*), which hold that in a case like this the injunction bond actually filed is the measure of a plaintiff's liability.

The result reached below was correct. It is well settled that attorneys' fees and expenses of litigation are not recoverable in federal courts under an injunction bond conditioned (as were the $2,000 and $10,000 bonds) for payment of costs and damages. *Tullock* v. *Mulvane*, 184 U. S. 497, 511; *Missouri, Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 530, 539-40; *Oelrichs* v. *Spain*, 15 Wall. 211, 230-1; *Bein* v. *Heath*, 12 How. 168, 178-9. On the theory of the recovery allowed on the $25,000 bond, "defendants do not claim that the amount allowed is inadequate" (R. 593). A further reason showing that the result reached below was correct is given in the opinion below (R. 592), and is not attacked by defendants, namely, the lack of required segregation or allocation of the claimed fees and expenses as between the various phases of the litigation.

It is respectfully submitted that the questions here presented do not justify certiorari.

CONCLUSION.

The petition for certiorari should be denied because the case was correctly decided below and petitioners present neither a conflict of decisions nor a question of general importance.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1087

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *et al., Petitioners,*

v.

DONNELLY GARMENT COMPANY, a Corporation; DONNELLY GARMENT SALES COMPANY, a Corporation; DONNELLY GARMENT WORKERS' UNION, *et al.*, and CENTRAL SURETY AND INSURANCE COMPANY

REPLY MEMORANDUM FOR THE PETITIONER

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CITATIONS

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REPLY MEMORANDUM FOR THE PETITIONER

Although we are reluctant to impose a further Memorandum upon the Court, we believe that there are a few matters in the respondents' and interveners' brief in opposition which require comment.

I

(Petition, pp. 15-17).
(Brief in Opposition, pp. 15-17).

In our petition we relied on the well-settled rule that a statutory bond, and the mandatory statute which requires it, are to be read *in pari materia.* The court

below accepted the rule (R. 587), but, for reasons the invalidity of which we have reviewed in the petition (pp. 15-17), refused to apply it in this case. Respondents now, however, appear to challenge this rule, and to assert that even where a mandatory statute is involved, the bond, and not the statute, governs.

The cases which they cite for that position, however, wholly fail to support it. In none of those cited at p. 15 of the Brief in Opposition is there any indication of a conflict with the general rule. *Houghton* v. *Meyer*, 208 U. S. 149, involved a permissive statute, not a mandatory one; the court had full discretion as to the terms of the bond, and its determination was, therefore, of course controlling. *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228, makes no reference to any statute; although decided subsequent to the passage of Section 382 of the Clayton Act, that section is not referred to in the opinion, nor in the briefs in this Court, which we have examined. *Minneapolis, etc., Ry. Co.* v. *Washburn Lignite Coal Co.*, 254 U. S. 370, came up from a state court, and no mandatory statute was involved. And in *Meyers* v. *Block*, 120 U. S. 206; *Russell* v. *Farley*, 105 U. S. 433; and *Bein* v. *Heath*, 12 How. 168, there were no statutes involved at all.

The same comment is applicable to the cases cited by respondents for the proposition that the terms of the bonds control over the provisions of Section 382 of the Clayton Act (p. 16). In *not one of those cases* was Section 382 cited. *Lawrence* v. *St. Louis-San Francisco Ry. Co.* we have already noted above. The same absence of any reference to Section 382 is also true of *Berger Mfg. Co.* v. *Huggins*, 242 Fed. 853 (C. C. A. 8th); *United Motor Service, Inc.* v. *Tropic-Aire, Inc.*, 57 F. (2d) 479 (C. C. A. 8th); *Tenth Ward Road Dis-*

trict v. *Texas & Pacific Ry. Co.*, 12 F. (2d) 245 (C. C. A. 5th); and *Becker* v. *Stander*, 17 F. (2d) 772 (E. D. La.).

The petition, however, cited (p. 15) a case in which Section 382 *was* involved and discussed, and in which the *in pari materia* rule *was* applied, *Heiser* v. *Woodruff*, 128 F. (2d) 178 (C. C. A. 10th). Since respondents now assert (p. 17) that the *Heiser* case is squarely opposed to our position, it may be well to state the facts, which show that the terms of the *bond* must yield to the terms of the mandatory *statute*. There a temporary injunction had issued, and a bond had been furnished conditioned "for payment of any damages which might be sustained by reason of the wrongful issuance of such injunction, *including reasonable attorneys fees*". After the temporary injunction had been dissolved, the trial court in assessing defendant's damages awarded a judgment for $1,518.42, of which $1500 was for attorneys fees. The Circuit Court of Appeals reversed, holding that despite the language of the bond, Section 382 prevented recovery since such fees were not an element of "damages" under that section. The *statute*, not the bond, controlled. The case is fully consistent with, and fully supports, our position, and by the same token, is diametrically opposed to the respondents oft repeated view that "liability is dependent upon the bond actually filed". As the *Heiser* case shows, that simply is not true under a mandatory statute.

II

(Petition, p. 19).
(Brief in Opposition, pp. 22-23).

In our petition we urged that, apart from the bonds, recovery should be allowed on the *undertaking* required

of the plaintiffs and interveners by Section 7. The court below denied the claim by refusing to distinguish between the statutory "undertaking" and the "adequate security". Respondents now suggest that the decision below can be supported by construing "an undertaking with adequate *security*" as if it had said "an undertaking with adequate *surety*". Unfortunately for the argument, Section 7 uses the word "surety" several times, when it wishes to refer to the surety. Certainly it is highly unlikely that Congress would also in the same section use the unusual phrase "adequate security" to refer to a surety. "Adequate security" means just what it says, a bond, or possibly a cash deposit. That is what is fixed by the court; the undertaking is imposed by the statute itself.

III

(Petition, pp. 21-22).
(Brief in Opposition, pp. 25-26).

Defendants urge that the issue in this case will no longer arise because the issue of what constitutes a "labor dispute" has now been settled. There are two answers. First, while many types of controversies are now clearly within the statute which were, at first, in doubt, it does not follow that the shadow line has been eliminated. Close cases will continue to arise even though the wide ambit of the statute is now generally accepted. And, as the petition points out (p. 20 n.), it is in just such cases that the protection of Section 7 is most necessary.

The second answer is furnished by the instant case. Even after the Norris-LaGuardia Act was held applicable in this case, the court nevertheless failed to follow the full mandate of Section 7 of the Act in exact-

ing the $25,000 bond (See Pet., p. 9). The issue may arise, in other words, even where the Act is found applicable.*

Respectfully submitted,

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April 19, 1945.

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* It should be noted that the statement of the first "Question Presented" in the Brief in Opposition (p. 2) assumes one fact which is definitely in issue—that the third ($25,000) bond was issued under Rule 74 (See Pet., Specification of Errors, No. 3, p. 13). Defendants contend that it was issued under Section 7, not only because the Norris-La Guardia Act has then been held applicable, but also because Rule 74 itself does not in terms apply at all. Moreover, the identity of phrasing between the bond and Section 7 indicates that it was used as a model; indeed, attorneys fees, which were included in that bond, are required only by Section 7, and not by Rule 74. With respect to that bond, therefore, we believe that all of respondent's arguments fail completely. It was exacted under Section 7, and should be construed as including all of the provisions required by that section.